No. 12448

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FLORENCE K. LIVINGSTON, EXECUTRIX OF THE WILL OF BRONTE M. AIKINS, DECEASED (SUED HEREIN AS B. M. AIKINS), FLORENCE K. LIVINGSTON, EXECUTRIX OF THE LAST WILL OF FLORENCE L. KIRCHEN, DECEASED, GEORGE B. PARKER, NELLE GRENVILLE PARKER, VERNON S. BATZ (ALSO KNOWN AS V. S. BATZ), EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPORATION, LTD., A CORPORATION, HONOLULU OIL CORPORATION, A CORPORATION, SEABOARD OIL COMPANY OF DELAWARE, A CORPORATION, AND THE COUNTY OF KERN, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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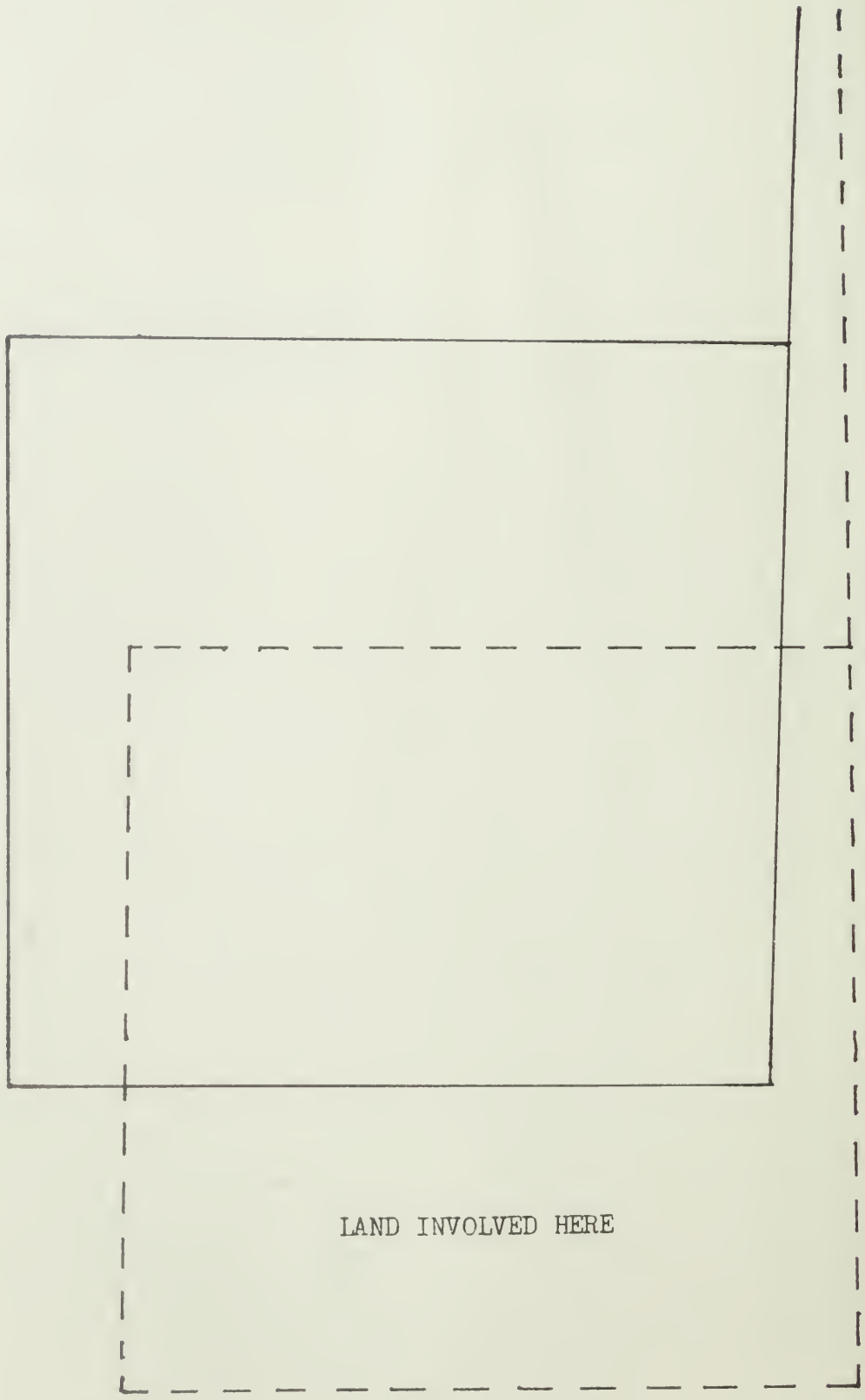

——— LINES OF REED SURVEY

- - - - - LINES OF CARPENTER SURVEY

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OPINION BELOW

The opinion of the district court (R. 28-42) is reported in 84 F. Supp. 260.

JURISDICTION

This is an appeal from a judgment entered August 22, 1949, quieting title to certain land in the appellees against the United States (R. 43). Notice of appeal was

filed October 20, 1949 (R. 46). The jurisdiction of the district court was invoked under 28 U.S.C. sec. 1345. The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATUTE INVOLVED

Pertinent portions of the Act of March 3, 1853, 10 Stat. 244, granting school lands to the State of California, are set forth in the appendix, *infra,* pp. 21-22.

QUESTION PRESENTED

Whether a second official survey of a section of land granted to California as school land, which was made to correct errors in the first official survey, passed title to new lands thus brought within the section in addition to lands granted by the original survey.

STATEMENT

The United States instituted this action to quiet title and to enjoin trespasses on certain land in Kern County, California, by filing a complaint against the appellees on May 2, 1947 (R. 2-14, 51). The facts on which the action depend are as follows:

By the Act of March 3, 1853, 10 Stat. 244, the United States granted to the State of California Sections 16 and 36 of every township of the public domain for the support of its common schools. The Act also provided for selection of lieu lands by the State for acreages settled within such sections before survey.

On February 4, 1869, the United States employed one John Reed to survey certain areas of the public lands in California (R. 65). Pursuant thereto he surveyed and located, among others, Section 36 of Township 29 South, Range 20 East, Mount Diablo Base and Meridian (R. 6, 28, 66). The survey was approved by the United States Surveyor General for California on April

27, 1869, and a plat of it was filed with the Register of the United States Land Office at Visalia on May 28, 1869 (R. 5, 12, 82, 117, 119). Section 36 contained approximately 40 acres more than the standard 640-acre section (R. 29, 83, 84, 87, 89, 135, 172, 177).

The State acted upon the Reed survey of Section 36 in the following way. Prior to the Reed survey of 1869, one Edwin M. Crocker had preempted 160 acres, more or less (SW¼ of NW¼, N½ and SW¼ of SW¼) of Reed's Section 36 (R. 21, 68, 88, 117, 119, 132). Letters patent were issued by the United States to Crocker for those 160 acres in 1871 (R. 21, 68, 88). In 1874 the State of California for its loss of acreage, because of the Crocker preemption, selected as lieu lands 160 acres in Sections 26 and 35 of the same township and subsequently disposed of them to private grantees (R. 21, 88-89). In addition, on March 1, 1873, California patented 360 acres, more or less, (N½ and SE¼ of NW¼, NE¼, N½ of SE¼) of Reed's Section 36 to Henry Miller and Charles Lux (R. 67, 83-84, 87). On November 29, 1892, the State issued a certificate of purchase to one J. J. Mack of the remaining 120 acres (S½ of SE¼ and SE¼ of SW¼) of Section 36 (R. 73, 77, 79). A patent was issued March 9, 1894 (R. 69-71, 82). This patent, as well as the one to Miller and Lux, recited "that the tracts of Grant of Sixteenth and Thirty-sixth Section School Land hereinafter described have been duly and properly located in accordance with law" (R. 67, 70).

In 1892, the Assistant Commissioner of the General Land Office ordered a new survey of Township 29 South, Range 20 East, because investigation indicated that there was a strip of land between this township and adjoining townships which was not covered by any of the surveys of those townships (R. 93-104). It further indicated that the lines run by Reed were "fictitious

and fraudulent" and "worthless as a basis for the disposal of the lands in said township" (R. 93-104).

One Howard B. Carpenter was employed to make the new survey (R. 106-108). His survey was approved by the United States Surveyor General for California on November 18, 1893, and by the Commissioner of the General Land Office on January 31, 1894 (R. 13, 110). The Carpenter survey differed from the Reed survey, as to Section 36, in that the boundary lines were shifted southward and eastward to embrace a considerable tract of land on the south side and a narrow strip on the east side, altogether about 304.63 acres, not theretofore included within the older section lines (R. 14, 28-29, 135, 146, 161; see diagram facing page one hereof). Carpenter's survey of Section 36 includes about 330 acres of land which had been included by Reed in his Section 36. The remainder of Reed's Section 36 was shown by Carpenter to be in what Carpenter designated as Sections 25, 26, and 35, on the northern and western borders of Carpenter's Section 36 (R. 29, 40, 118). The total acreage of Carpenter's Section 36 was 634.63 acres (R. 13, 29).

Thereafter, on March 25, 1912, the State Surveyor General wrote to the Commissioner of the General Land Office in Washington, D. C., as follows (R. 117-118):

> T. 29 S., R. 20 E., M.D.M., was surveyed in 1869 by John Reed and the plat thereof was approved April 27, 1869.
>
> April 15, 1872, the Register of the United States Land Office at Visalia certified that the plat of said township had been on file in his office over ninety days, that the SW¼ of NW¼, N½ and SW¼ of SW¼ of Section 36, were pre-empted and that the balance of the section was clear.

> Upon the approval and filing of the plat of said township the title to the unencumbered portion of Section 36, as surveyed by Reed, vested in the State of California, and said portion was sold by and patented by the State.
>
> Another survey of T. 29 S., R. 20 E., was made by H. B. Carpenter in 1893 and the plat thereof was approved November 18, 1893. On said plat are shown the N.E., N.W., and S.W. corners of Section 36 as set by John Reed in 1869, but said corners were not adopted by Carpenter in his survey and portions of said Section 36, the title to which vested in the State under the Reed survey are now, according to the Carpenter survey, parts of Sections 25, 26 and 35, and the identity of Section 36 as surveyed by Reed and to which the State claims title, has been destroyed.
>
> Will you kindly advise this office why the identity of Section 36 as surveyed by Reed was not preserved when the Carpenter survey was made and what your department will do to perfect the State's title to Section 36 as surveyed in 1869?

In reply, on April 15, 1912, the Commissioner outlined the facts leading up to the Carpenter survey and the instructions given to Carpenter (R. 119-122). He concluded by stating that "Without attempting at this time to determine the question presented by you as to what the Department will do to perfect the State's title to Section 36 as surveyed in 1869, these facts are placed before you for such further action as the State may wish to take in the matter" (R. 122). Thereupon, the State Surveyor General made the following request of the Commissioner of the General Land Office on May 7, 1912 (R. 123):

> * * * the State of California respectfully requests you to construct a township plat and delineate thereon Section 36 as surveyed by John Reed in 1869, being the land the title to which vested in

> the State of California upon approval of said survey, which title the State disposed of through patents issued under the laws of the State.
>
> This office is not advised by the General Land Office when a township is surveyed or resurveyed, therefore, when a resurvey is made, in some instances many years elapse before the State discovers that a new survey of a township has been made, which in this case, is the reason for this belated request to show the locus of said Section 36, as surveyed in 1869. The State cannot adjust its claim to a school section located by a resurvey, in a position different from the one originally established, to which the State's title vested.

As a result of this correspondence, the Commissioner, on September 10, 1912, ordered one Lincoln E. Wilkes to relocate on the ground the lines of the Reed survey and make a plat of it in relation to the Carpenter survey (R. 14, 123-137). Carpenter had noted on his survey all but the southeast corner of the Reed survey (R. 118, 121, 126). He had been instructed to note all of Reed's corners on his own survey, as well as all improvements and well-defined claims (R. 107, 121). Wilkes commenced his survey on January 13, 1914, and completed it on January 18, 1914 (R. 14, 134). The United States Surveyor General for California approved it on April 7, 1915 (R. 14, 134).

In the meantime, on March 22, 1912, one Judson H. Jordan, the predecessor in title claimed by appellees, applied to the State Surveyor General and Register of the State Land Office to purchase the lands on the east and south of Section 36, contained in the Carpenter survey of that section but outside the lines of the Reed survey (R. 140, 144, 152-153). The application to purchase this area of approximately 304.63 acres was denied on October 1, 1912, after a full hearing, on the ground that the Reed survey of 1869 "fixed and

established" the "quantity" and "boundary lines" of the Section 36 which vested in the State and that the Section 36 of the Carpenter survey "while designated section 36 is not the section 36 which passed to the State of California under the said Act of March 3, 1853; that the said section 36 which passed to the said State under said act does not include any of the land described in said applicant's application; that said land belongs to the government of the United States" (R. 149, 152-155).

Jordan then sought mandamus in the Superior Court of California for County of San Francisco to compel approval of the application (R. 139-155). That court granted a writ of mandamus on February 26, 1913 (R. 156-158), and its decision was affirmed by the District Court of Appeals for the First District on July 23, 1914. *Jordan* v. *Kingsbury,* 25 Cal. App. 166, 143 Pac. 69. Pursuant thereto Jordan's application to purchase was approved on December 1, 1914, and a patent was issued to him on November 19, 1915, (R. 159-161, 163-165). By mesne conveyances that title to the land is now in the appellees (R. 162).

On May 2, 1947, the United States instituted this action against the appellees to quiet its title to that land (R. 2-14). At the trial the United States contended, as the State had done before, that title to Reed's Section 36, approved in 1869, passed at that time to the State as its school land section, and that the corrective survey by Carpenter granted no new rights nor affected rights already vested. The appellees urged that the Carpenter survey passed title to the State to all the land which it embraced in Section 36. The district court ruled in favor of the appellees and entered judgment quieting title in them on August 22, 1949 (R. 43-45). This appeal followed (R. 46).

SPECIFICATION OF ERRORS

The statement of points relied upon by the United States on this appeal (R. 46-47) may be summarized as follows:

1. The district court erred in holding that the United States granted to the State of California as school land that portion of the Northeast Quarter and the South Half of Section 36, Township 29 South, Range 20 East, M.D.B. & M., which lies outside the boundaries of the survey of that section by John Reed, but within the lines of that section as surveyed by Howard B. Carpenter.

2. The district court erred in holding that the United States does not have title to the land described in the preceding paragraph.

ARGUMENT

The Resurvey Did Not Pass Title to the State of California to Land Not Included in the Original Approved Survey

The Act of March 3, 1853, 10 Stat. 244, granted "to the State *in praesenti* a quantity of lands equal in amount to the 16th and 36th sections in each township." *Heydenfeldt* v. *Daney Gold, Etc., Co.,* 93 U.S. 634, 640 (1876). Congress intended "that on the survey, defining the sections, the title to the land should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose."[1] *United States* v. *Morrison,* 240 U.S. 192, 201 (1916); *United States* v. *Wyoming,* 331 U.S. 440, 443 (1947). In these instances of "the grant of the sixteenth and thirty-sixth sections of each

[1] The State of California was not solely dependent upon surveys by the United States. Under the Act of July 23, 1866, 14 Stat. 218, the State could make its own surveys of school lands and obtain title thereby. *Huff* v. *Doyle,* 93 U.S. 558 (1876).

township to the several states for educational purposes, there is no provision for either listing or patent. Such instruments are deemed unnecessary because Congress in the grant itself has identified the land conveyed with sufficient precision." *Southern Development Co.* v. *Enderson,* 200 Fed. 272, 274 (Nev. 1912); *Cooper* v. *Roberts,* 18 How. 173, 179 (1855); *Hedrick* v. *Hughes,* 82 U.S. 123, 129 (1872). Surveys of these sections were "officially complete" and passed title when they were approved by the United States Surveyor General for California prior to April 17, 1879, and by the Commissioner of the General Land Office after that date. *Frasher* v. *O'Connor,* 115 U.S. 102, 114 (1885); *Tubbs* v. *Wilhoit,* 138 U.S. 134, 142-144 (1891); *United States* v. *Morrison,* 240 U.S. 192, 210 (1916); *United States* v. *Cowlishaw,* 202 Fed. 317 (Ore. 1913); *F. A. Hyde & Co.,* 37 L. D. 164 (1908); cf. *United States* v. *Wyoming,* 331 U.S. 440, 455-456 (1947).

Such a "survey of public lands does not *ascertain* boundaries; it *creates* them." *Cox* v. *Hart,* 260 U.S. 427 (1922). "They [the statutes of the United States] further provide that 'the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof'. Rev. Stat. Sec. 2396, subdiv. 2." *Cragin* v. *Powell,* 128 U. S. 691, 697 (1888). Irregularity in the shape and place of a school land section, arising from the survey of the township, does not defeat the operation of the school grant. *State of Michigan,* 8 L. D. 560 (1889).

Where rights are acquired under an approved survey, the United States is without authority to affect those rights by a corrective survey. As the Supreme

Court said in *United States* v. *State Investment Co.*, 264 U.S. 206, 212 (1924):

> Although the power to correct surveys of the public land belongs to the political department of the Government and the Land Department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action, *Cragin* v. *Powell,* 128 U.S. 691, 698; *Knight* v. *Land Association,* 142 U.S. 161, 177; *Kirwan* v. *Murphy,* 189 U.S. 35, 54, this power of supervision and correction by the Department is "subject to the necessary and decided limitation" that when it has once made and approved a Governmental survey of public lands, and has disposed of them, the courts may protect the private rights acquired against interference by corrective surveys subsequently made by the Department. *Cragin* v. *Powell, supra,* p. 699. A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having "no jurisdiction to intermeddle with them in the form of a second survey." *Kean* v. *Canal Co.,* 190 U.S. 452, 461. And although the United States, so long as it has not conveyed its land, may survey and resurvey what it owns, and establish and re-establish boundaries, what it thus does is "for its own information" and "cannot affect the rights of owners on the other side of the line already existing." *Lane* v. *Darlington,* 249 U.S. 331, 333.

In *Lindsey* v. *Hawes, et al.,* 67 U.S. 554 (1862), the Court said (p. 560):

> It is to be remembered that the original survey of Bennett, was the survey of the Government; that it was made in 1833; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years, the Government had acted upon and recognized it as valid and correct, and above all had sold the land to Lindsey by this its own survey, received the purchase money

> and given him a patent certificate, five years before any suggestion was made of this error. The money thus received by the Government has never been returned, nor do we think it would vary the rights of the parties if it had actually been tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter section, affect the question of the precise locality of Lindsey's residence, as bearing on his right to enter that fraction as a pre-emption, the Government was bound by the original survey of Bennett.

In *New Mexico* v. *Colorado,* 267 U. S. 30 (1925), the Court said (p. 41):

> Thus, after the Land Department has surveyed and disposed of public lands, the rights therein acquired are not affected by corrective surveys subsequently made by the Department.

In *Cragin* v. *Powell,* 128 U. S. 691 (1888), the Court said (p. 699):

> * * * when the Land Department has once made and approved a Governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office), and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the Government against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale.

In *Lane* v. *Darlington,* 249 U. S. 331 (1919), it was said (p. 334):

> But this retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account.

In *People* v. *Covell,* 17 Cal. App. 2d 627, 62 P. 2d 602 (1936), the court stated that "whether accurate or

inaccurate, the original survey granting and establishing certain rights fixed the rights not only of the Government, but of the landowners, and that the Government, after establishing such a line and granting and conveying certain rights, possessed no power thereafter to change the course of that line." In *Churchill Co.* v. *Beal,* 278 Pac. 894 (Cal. App., 1929), the same court approved the following rule: "When public land has been surveyed by authority of the United States, and patented with reference to the boundaries as fixed by such surveys, the corners and lines so established, whether correct or not, are conclusive and cannot be altered or controlled by other surveys." This universally applied rule was enacted into statute by the Acts of March 3, 1909, 35 Stat. 845, and June 25, 1910, 36 Stat. 884, 43 U. S. C. 772.

Applying the foregoing law to the present case, it is evident that title to Section 36, as surveyed by Reed, passed irrevocably to California when that survey was approved in 1869. Approval of that survey had the same force as a patent to the State. The State received more than a full section of 640 acres. The rights of the parties with respect to that land became fixed, whether the survey was accurate or not.[2] The state thus received all the land to which it was entitled. After the rights of the State had thus vested, the United States could not by the corrective resurvey of 1894 recover any excess acreage found to be in the first survey. The new survey in the contemplation of the law

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[2] It is not known what the Commissioner of the General Land Office meant by the word "fraudulent" in connection with the Reed survey (R. 93-104). It seems probable that he used it as descriptive of his conception of the position which the United States should take as between itself and Deputy Surveyor Reed and his bondsman. In any event, as the court below noted (R. 32), there was no fraud between the United States and the State of California. As between them, there was merely a mistake and as appears from the foregoing decisions mistakes do not vitiate a survey.

was only "an investigation by the United States on its own account" and "for its own information", *Lane* v. *Darlington, supra; United States* v. *State Investment Co., supra.* It is not reasonable nor equitable to hold that this fixing of rights moved only in one direction. Surely, the United States may correct surveys "for its own information" without thereby granting all land brought into a section for the first time by the new survey, while, at the same time, it is not able to recover land excluded from the section by that survey. It has been held in cases of patented land that the corrective resurvey did not enlarge the land conveyed by the United States under the original survey, even though the description was in terms of section lines. *Gleason* v. *White,* 199 U. S. 54 (1905); *Gazzam* v. *Lessee of Elam Phillips, et al.,* 20 How. 372 (1857); *Frank P. Ryan,* 13 L. D. 219 (1891); *Hiram Brown, et al.,* 13 L. D. 392 (1891); *McKittrick Oil Company* v. *Southern Pacific R. R. Co.,* 37 L. D. 243 (1908). These principles should dispose of the question in this case contrary to the views of the district court and of the appellees.

There is additional reason in law why the original survey in this case governs the lands which passed to the State. We have shown, and the district court recognized (R. 36-37), that the United States is irrevocably bound by the Reed survey. It cannot by a corrective survey intermeddle with the rights which it granted thereby. In such a case, "The Government is bound by its patent; is estopped to disavow the subdivision granted; and as estoppels are mutual, [the grantee] is equally bound by the grant."[3] That principle of mutual estoppel is generally recognized in cases

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[3] From the dissent in *Brown's Lessee* v. *Clements,* 3 How. 650, 671 (1844), which was subsequently followed in *Gazzam* v. *Lessee of Elam Phillips, et al.,* 20 How. 372 (1857), overruling the majority decision in the former case.

granting public lands. In *New Mexico* v. *Colorado,* 267 U. S. 30, 41 (1925), the Supreme Court said: "And independently of these matters, New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood." In *Kissell* v. *St. Louis Public Schools,* 18 How. 19 (1855), the Court said (p. 25):

> We are further of opinion that the certificate of the Surveyor-General, above set forth and which was accepted by the grantees, is record evidence of title, by the recitals in which the Government and the board of school directors are mutually bound and concluded. And this instrument, declaring that the land prescribed was reserved for the support of schools, and the courts of justice having no power to revise the acts of the surveyor-general under these statutes, as respects the school lands, it is not open to them to inquire whether the lands set apart were or were not lots of the description referred to in the statutes. The parties interested have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title.

In *Heydenfeldt* v. *Daney Gold, Etc., Co.*, 93 U. S. 634 (1876), the Court said (p. 641):

> Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of Feb. 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

> We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the Government of the United States to the mineral lands."

In *United States* v. *Oregon,* 295 U. S. 1 (1935), the Court said (p. 10):

> We do not pass upon the first ground, but agree that the acceptance by the State of [school] lands elsewhere, in lieu of lands lying within the meander line adjacent to the granted uplands, was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands as an incident to the grant of uplands, as to preclude the assertion of that claim here.

Estoppel was also applied in *Cragin* v. *Powell,* 128 U. S. 691, 700 (1888), *Gleason* v. *White,* 199 U. S. 54, 62 (1905), and *St. Paul, M. & M. Ry. Co.* v. *Sage,* 71 Fed. 40 (C.C.A. 8, 1895), appeal dismissed 18 S. Ct. 946, 42 L. Ed. 1218.

In the instant case, there are more elements of estoppel than justified use of the rule in the foregoing cases. The State officers charged with the acceptance and administration of school land grants insisted repeatedly, and against the very challenge raised here, that the lands added to the Reed survey of Section 36 by the Carpenter survey "while designated section 36 is not the section 36 which passed to the State of California under the said Act of March 3, 1853; that the said section 36 which passed to the said State under said act does not include any of the land described in said applicant's application; that said land belongs to the government of the United States" (R. 154, 82, 117-118, 123, 148-155). In addition, the State conveyed all the land in the Reed survey, and on the basis of that

survey, to private individuals, both before and after (R. 69-71, 82) approval of the Carpenter survey. These conveyances, of course, included lands patented to Miller and Lux lying outside the exterior lines of the Carpenter survey of section 36. Moreover, the State selected and sold lieu lands in place of those pre-empted by Crocker. Most of Crocker's land was west of the west exterior boundary of the Carpenter survey but within the lines of the Reed survey. This last act alone, *United States* v. *Oregon, supra,* "was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands * * * as to preclude the assertion of that claim here."

There was no act on the part of the United States which would have led the State or appellees' predecessor in title, Jordan, who insisted on a patent against the views of the State officials and with full knowledge of the potential claim of the United States to title, to construe the Carpenter survey as granting additional lands. Neither the State nor Jordan was misled. Inaction on the part of the United States at the time of Jordan's law suit or subsequently could not be a ground for divesting the United States of its title. There is no compelling reason why the *inter alios* decision in *Jordan* v. *Kingsbury,* 25 Cal. App. 166, 143 Pac. 69 (1914), should have reached the land records of the Department of the Interior, or, if it had, why the Commissioner of the General Land Office or the Secretary of the Interior was required to take any action until, in his opinion, the interests of the United States required it. In any event, the fact is that at all times material the United States has asserted title in itself to lands in California comprising those areas of Sections 16 and 36 added to original surveys by corrective resurveys. Exhibits C, D, E, F-1, F-2, and F-3, submitted to the district

court in the appendix to the Government's brief,[4] are copies of letters from the Assistant Commissioner of the General Land Office to the Register and Receiver at Los Angeles with copies to the State officials. They all have to do with resurveys of certain townships and contain rulings to the effect that the areas designated as Sections 16 and 36 by such resurveys, to the extent that they differ from the areas so designated by the original surveys, will be administered as public lands.

Exhibit B-1 is a copy of the plat of Wilkes' segregation survey of Section 36, Township 30 S., Range 21 E., M.D.M., approved August 5, 1915. This township corners on the township involved in the instant case. It was originally surveyed by Reed in 1869 at or about the time he surveyed Township 29, Range 20. It was resurveyed by Carpenter under the same instructions (R. 106-109) which governed his resurvey of the township involved here and the segregation survey (B-1) was made by Wilkes at or about the same time and for the same reason that the Wilkes segregation survey of Section 36, Township 29 South, Range 20 East (R. 14) was made. The basic facts in connection with Exhibit B-1 are therefore identical to the facts of the present case.

Both the United States and the State of California have treated the area designated on Exhibit B-1 as lots 1 to 8, inclusive, and S½ of SW¼, Sec. 36, as public lands of the United States as evidenced by the fact that on October 29, 1919, these lands were filed on by one Richard Whitford and on April 15, 1925, a United States patent was issued to Whitford's heirs. A copy of that patent is Exhibit B-2.

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[4] These exhibits were considered by the district court along with exhibits appended to the appellees' brief (R. 35, 42, 49, 50), and are a part of the record here not printed (R. 49, 50, 196).

Exhibits G and H are copies of the plats of the resurveys of the two townships referred to in Exhibits F-1, F-2, and F-3. An examination of Exhibits B-1, G and H illustrates the results which would follow if it were held that where section lines have been changed by a resurvey the areas designated as Sections 16 and 36 by such resurvey also pass to the State. In such event, a State, under its in place and lieu selection rights, would in many instances become entitled to as many as four different sections on account of the surveys in a single township—and this in spite of the fact that the statute grants but two. Such a ruling would upset all existing titles in Sections 16 and 36 in resurveyed townships in this and other states and would be contrary to the administrative construction of the officials of both the United States and the State of California. The suggestion of the court below (R. 42) that the cited instances are not persuasive because it does not appear there that the State advanced the claim here asserted obviously lacks merit. The present claim did not originate with the State officials. They granted the land to the appellees' predecessors in title only under compulsion of the decree in *Jordan* v. *Kingsbury,* 25 Cal. App. 166, 143 Pac. 69 (1914).

Further consideration of the effect of the district court's decision emphasizes its error. Since the United States is bound by the original survey, the rule of the district court that the later corrective resurvey passes title to the State to all lands embraced within it would always result in giving the State both sections, whether one was contained within the other, they overlapped as here, or they were entirely separated. This has no support in the granting statute or in reason. Congress did not grant two Sections 36. The rule of the district court makes two Sections 36. It cannot be regarded merely as enlarging the original section. The second survey excludes part of the original survey and, as

we have shown, the original survey stands for all time as to rights which vested under it. Surely, it was not intended that the Commissioner of the General Land Office could not in the public interest correct errors in the surveys of public lands without thus automatically granting more land than either he or Congress intended. That the Commissioner had no intention to detract from or enlarge rights which vested under the Reed survey of 1869 is apparent from the fact that Carpenter was instructed to "carefully locate any improvements or well defined claims of settlers indicated by fences or monuments in order that they may be shown upon the plats of the townships as a basis for adjustment, but before destroying Reed's corners as directed, you will ascertain their relation to your own surveys by bearing and distance" (R. 107). Plainly, he intended the settlers to adjust the *description* of their claims to the new survey. And also "it was assumed that the State would adjust its claim thereto" (R. 122). The fact that Carpenter, as the Commissioner observed, "appears not to have been impressed with the fact either that a patent had been issued for 160 acres under a pre-emption entry in sec. 36 or that any necessity existed for the observance of the fact that the title of the remaining 480 acres had vested in the State under the school land law" (R. 121) does not alter the intention of the Commissioner that the resurvey should not operate to change the status quo.

Finally, the cases relied on by the California District Court of Appeal for the First District in *Jordan* v. *Kingsbury,* 25 Cal. App. 166, 143 Pac. 69 (1914), and by the district court in this case (R. 30) to establish that the Carpenter survey passed title to the State do not support that holding. The cases of *Cragin* v. *Powell,* 128 U.S. 691 (1888), and *Gleason* v. *White,* 199 U.S.

54 (1905), plainly hold that the rights acquired under the first survey will not be diminished nor enlarged by a subsequent survey. *Hardin* v. *Jordan,* 140 U.S. 371 (1891), did not involve the question of a resurvey. The case of *Knight* v. *United States Land Association,* 142 U.S. 161 (1891), merely held that the Secretary of the Interior had authority, on appeal, to review and set aside a survey approved by the Commissioner of the General Land Office before any patent issued. See *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, 19-21 (1935); *United States* v. *State Investment Co.,* 264 U.S. 206, 212 (1924); *Pueblo Lands of San Francisco,* 2 L. D. 346 (1883); *Pueblo of San Francisco,* 5 L. D. 483 (1887).

Since, as we have shown, the United States did not by the resurvey grant the land here in question to the State of California, it follows that the patent from the State to appellees' predecessor in title, Jordan, was without effect and that appellees have no title to the land.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed.

Respectfully,

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APPENDIX

The Act of March 3, 1853, 10 Stat. 244, provides:

Sec. 6. *And be it further enacted,* That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter presented. * * *

* * * * *

Sec. 7. *And be it further enacted,* That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall

make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.

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